FILED
NOV 25 1961
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 522

AMERICAN EMPLOYERS INSURANCE COMPANY,
Petitioner,

v.

JOHN ZABLOSKY,
Respondent.

BRIEF FOR RESPONDENT JOHN ZABLOSKY IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Petition 29-34) is reported at *292 F. 2d 412.*

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1961 (Petition 35). A Petition for Rehearing was denied on September 16, 1961 (Petition 37). The Petition for Writ of Certiorari was filed on October 27, 1961. Jurisdiction of this court is invoked under *28 U. S. C., Section 1254.*

QUESTIONS PRESENTED

Whether the courts below erred in holding that substantial evidence of ownership of the insured vehicle, in addition to the administrative presumption of ownership arising from the registration of the vehicle in the insured's name, raised an issue for the jury on the question of ownership notwithstanding the Texas rule that the administrative presumption vanishes when met by clear, positive, and undisputed evidence of ownership in another.

Whether the court below erred in affirming judgment for respondent, entered on jury finding that the insured was the owner of the vehicle registered in his name, and specifically listed in the insurance policy, and for which a full owner's premium, which would not have been chargeable for a hired or leased vehicle registered in the name of the insured, was charged, notwithstanding the fact that the policy contained statements that the vehicle was owned by another and leased to insured, that title to the vehicle was registered in the name of the insured, but the vehicle had been sold to another and that for interpretation of coverage under the policy that such other should be considered to be the owner of the vehicle.

STATEMENT

Respondent sued petitioner to recover, upon a policy of comprehensive automobile liability insurance issued by petitioner, the amount of a judgment for damages for personal injuries obtained by respondent in the District Court

of Van Zandt County, Texas, against Roy Alvin Tucker and H. L. Flynt (R. pp. 1-7).

The policy of comprehensive automobile liability insurance was issued to B. F. Schoeneman dba Midwest Contracting Company, named insured, and (with certain exceptions not applicable here) under the omnibus clause insured any person using an automobile owned by the named insured, or any person legally responsible for the use thereof, provided the actual use of the automobile was with the permission of the named insured, against damages which such persons should become legally obligated to pay because of bodily injury caused by accident and arising out of the use of the automobile (R. pp. 188, 189, Insuring Agreements I and III).

The damages for which respondent recovered judgment in the state court resulted from personal injuries received by respondent in an accident wherein, while crossing U. S. Highway 80 in the City of Grand Saline, Texas, on foot, on December 14, 1953, respondent was struck by a Ford motor truck being driven by Roy Alvin Tucker, as agent and employee of H. L. Flynt, on a mission for H. L. Flynt (R. pp. 14, 231).

At the time of the accident the Ford motor truck was registered in the name of Midwest Contracting Company, the trade name under which B. F. Schoeneman operated a sole proprietorship (R. pp. 58, 243-244). The certificate of title to the motor vehicle was in the name of Midwest Contracting Company (R. pp. 60, 241). The truck was being purchased by B. F. Schoeneman dba Midwest Contracting

Company under a written conditional sales contract between Bankston-Hall Motors, Inc., dealer, and Midwest Contracting Company, by B. F. Schoeneman, owner, buyer (R. pp. 284-285). The purchase was upon an installment obligation signed by Midwest Contracting Company by B. F. Schoeneman, owner, buyer (R. p. 284). The installments on such purchase obligation before, at, and after the accident were paid by B. F. Schoeneman with his own funds (R. pp. 61, 287-288). The Ford motor truck was listed in the policy of comprehensive automobile liability insurance issued by petitioner to B. F. Schoeneman, dba Midwest Contracting Company, as a vehicle covered by the policy (R. p. 207) and B. F. Schoeneman was charged by and paid to petitioner a premium for coverage of the motor vehicle on a specified car basis which was equivalent to the premium chargeable for insurance of an owned automobile under the policy (R. pp. 83, 137-138).

B. F. Schoeneman testified that immediately upon purchase the truck was delivered to H. L. Flynt, with Schoeneman's knowledge, for use by Flynt in the hauling business in which he, Schoeneman, knew Flynt used drivers of his trucks (R. pp. 66-67).

ARGUMENT

Question One

Petitioner's claim to error of the Court of Appeals proceeds on the theory that *Empire Gas & Fuel Co. v. Muegge, 143 S. W. 2d 763 (Com. App. 1940, adopted S. Ct. Tex.); Pioneer Mutual Compensation Company v. Diaz, 177 S. W. 2d*

202 (S. Ct. Tex. 1944) and *United States Casualty Co. v. Ohio Casualty Co., C. C. A. 5, 208 F. 2d 451*, holding that the administrative presumption of ownership of a vehicle arising from the registration thereof is overcome by clear, positive, and undisputed evidence, and does not raise an issue of fact for the jury's determination when met by such positive proof, foreclosed any issue of fact in the case for consideration by the jury, and that the trial court erred in submitting the issue of ownership to the jury and the Court of Appeals erred in sustaining such submission.

Each of the three cases is authority for the abstract proposition that presumption of ownership of a vehicle arising from registration thereof is overcome by clear, positive, and undisputed evidence, and does not raise an issue for the jury's determination when met by such positive proof. In each of the cited cases a vehicle had been registered in the name of another who had no ownership in the vehicle of any kind or character whatsoever. In the first of the cases the vehicle was registered by the owner in the name of a corporation, without its knowledge or permission. In the second of the cases, the vehicle was registered in another's name because the owner believed it would have been unlawful to use the vehicle in his liquor operations if owned by him. In the third of the cases, the vehicle was registered in the name of another in order to enable that other to do hauling for the owner for which the other did not have a permit from the Railroad Commission of Texas.

Petitioners' proposition is based on the false premise that there was no evidence of ownership in the record here other

than the administrative presumption arising from the registration of the vehicle in the name of the named insured. In this premise petitioner is mistaken, for the reason that in this case there was substantial evidence of ownership independent of the presumption of ownership predicated upon the registration of the vehicle in the insured's name. In the record here there is in evidence a written conditional sales agreement signed by B. F. Schoeneman covering the purchase of the vehicle by B. F. Schoeneman, as purchaser (R. pp. 284-285). The agreement contains as a part thereof a note signed by B. F. Schoeneman as sole obligor for the purchase price (R. p. 284). The purchase obligation called for monthly payments on the purchase price by B. F. Schoeneman (R. p. 284). The evidence without dispute disclosed that the monthly payments were made by B. F. Schoeneman by checks disbursing his money and that such monthly payments were made in each of the twelve months leading up to the accident and in each of the twelve months following the accident by B. F. Schoeneman (R. pp. 61-63, 160-161). The evidence established the fact that B. F. Schoeneman as purchaser was carrying and paying for insurance on the truck at the time of the accident insuring B. F. Schoeneman against loss to the truck through the hazards of fire, theft and collision (R. pp. 63, 289). The evidence established that B. F. Schoeneman caused the truck to be carried in his comprehensive public liability policy (R. p. 64) and paid the equivalent of a full owner's premium for the insurance afforded by the policy in respect of the truck (R. pp. 83, 137-138) and that if the truck had not been owned by him he would have been covered

under the policy in respect of this truck without the charge of that premium (R. pp. 87, 189).

B. F. Schoeneman testified that the truck had been sold by Schoeneman to Flynt upon an oral conditional sales contract (R. pp. 71, 77). H. L. Flynt testified that he signed a statement on December 24, 1953, ten days after the accident, that he was buying the Ford truck from B. F. Schoeneman (R. pp. 101-102). He denied at the trial eight years later that this was true (R. p. 102). Each admitted that no transfer of the title certificate was made; in fact, each testified that the transfer was not to be made for a period of two years (R. pp. 74, 102-103), which would have constituted a violation of the laws of Texas (Article 1436-1, Penal Code of Texas) (Petition Sec. 33, p. 50, Secs. 52 and 53, p. 62). Each testified that no written agreement evidenced the alleged sale (R. pp. 71, 108). Each testified that no note and no mortgage was given by Flynt to Schoeneman to cover the alleged sale (R. pp. 77, 108). The evidence established the fact that Schoeneman, as owner, insured the vehicle against loss to the truck from the hazards of fire, theft, and collision (R. pp. 63, 289-292) and public liability and property damage (R. pp. 64-65, 188, 207). The evidence established the fact that Flynt, if the car was his, did not protect himself against the hazards of liability for bodily injury and property damage on account of the use of the truck (R. pp. 103-104). Schoeneman had priority on the use of the truck (R. pp. 76, 102).

Harper v. Highway Motor Freight Lines (Civ. App. Dallas, 1935), 89 S. W. 2d 448, is authority for the proposition that evidence of ownership consisting of an admission of own-

ership by the president of the company, in addition to the administrative presumption arising from proof that the name of the company appeared upon the side of the vehicle, was sufficient to raise a jury issue, notwithstanding the fact that under Texas rule presumption of ownership arising from the fact of the name of the company being upon the vehicle, vanished upon the testimony of the defendant's president at the trial that it did not own the vehicle. The evidence of ownership here was more substantial.

It is clear that there was substantial evidence of ownership, independent of the presumption arising from the registration of the vehicle in the name of the insured, to raise an issue for the jury on the question of the identity of the true owner, and that the Court of Appeals, in sustaining the correctness of the trial judge in so ruling and submitting the issue to the jury, did not incorrectly apply the law of Texas as declared by its Supreme Court.

Question Two

In respect to Question Two, petitioner argues that it intended to insure B. F. Schoeneman only and no other person in respect to liability growing out of the use of the Ford motor truck. Respondent was not able to produce the original insurance policy at the trial. B. F. Schoeneman could not find his policy (R. pp. 65-66). The petitioner supplied a copy reconstructed from its files certified to be a true copy. The Ford motor truck in question was added to the policy of liability insurance by endorsement 1C (R. p. 207), which contains the notation "owned by H. L. Flynt and leased to

insured". There also appears on the policy an endorsement (R. p. 222) which reads:

> "Title to the 1952 Ford Truck M#F7J2MP10547 and Standard Float Semi Trailer is vested in the name of B. F. Schoeneman DBA Midwest Contracting Company, however said automobile has been sold under a conditional sale agreement to H. L. Flint (sic). It is agreed that for interpretation of coverage under the policy H. L. Flint shall be considered to be the owner of said automobile."

It is undisputed that petitioner charged and collected a premium for the coverage of this automobile equivalent to the premium which would have been chargeable if the vehicle were owned by the named insured B. F. Schoeneman (R. pp. 83, 137-138). Such a premium under the insurance regulations of Texas in force at the time could have been charged for the coverage of a motor vehicle in two situations (1) where the vehicle was owned by the named insured, or (2) where the vehicle was owned by another and hired by the named insured (R. pp. 83, 132-133, 293). However, such rate could not have been charged for a hired automobile which was registered in the name of the named insured (R. pp. 83, 293). And B. F. Schoeneman was otherwise covered under the policy in respect of liability on non-owned automobiles without the charge of that premium (R. p. 87). The agent of petitioner who handled the coverage of the liability insurance in respect of the Ford motor truck testified that he understood that there was a contract of sale for the vehicle from Schoeneman, the named insured, to Flynt (R. pp. 136, 142, 143). The petitioner knew the title remained in Schoeneman. The policy so recited. These

facts put the petitioner upon notice under the laws of Texas that the sale was void and B. F. Schoeneman remained the owner of the Ford motor truck (Petition Sec. 33, p. 50, Secs. 52 and 53, p. 62). The petitioner charged B. F. Schoeneman an owner's rate for insuring the Ford motor truck under the policy. Clearly such a rate would not have been chargeable for insurance of the vehicle under the policy if it had been owned by H. L. Flynt. When the petitioner insured the vehicle under the policy and charged the named insured an owner's premium for such insurance, which would not have been chargeable for the vehicle if it had not been owned by the named insured, it by force of law intended to insure B. F. Schoeneman in respect to the vehicle and any person using the vehicle or any person legally responsible for the use thereof while used with the permission and consent of B. F. Schoeneman. This would hold regardless of an endorsement purporting to limit coverage. This is clear for the reason that the conditions of insurance policies in Texas are prescribed by the law of Texas. The comprehensive automobile liability policy written in this instance by the petitioner was one prescribed by Texas law which required that such a policy contain the omnibus clause which extends such insurance to the additional insured described above. Any endorsement attempting or purporting to eliminate such coverage would be in violation of law and of no legal effect whatsoever. The Supreme Court of Texas said in *United States Ins. Co. of Waco v. Boyer, 269 S. W. 2d 340:*

> "As a practical matter, the actual intent involved in the precise words is as much or more the intent of the

> Insurance Commission which prescribes the wording of the policy as it is the intent of the parties. It is unlawful to issue a policy in words other than those expressly approved by the Insurance Commission, and every insurance company selling this type of insurance is required to word its policies precisely alike. Art. 5.06 Insurance Code, V. A. C. S. Uniform policies are necessary to a uniform rate structure, which in turn resulted from the public injury caused by highly competitive wildcat insurance schemes. Therefore, a true search for what the courts usually speak of as the intent of parties will not be an inquiry as to what the words of the contract meant to this particular insurer or insured."

In this case the jury on disputed facts found that B. F. Schoeneman and not H. L. Flynt was the true owner of the Ford motor truck. The petitioner charged B. F. Schoeneman and collected from him a full owner's premium for the insurance provided by the policy. The petitioner had notice of the facts. The endorsement which would purport or attempt, if it does, to eliminate the omnibus clause is violative of Texas law and of no force or effect.

CONCLUSION

It is clear that the Court of Appeals did not ignore or incorrectly apply the Texas law involved in this cause as declared by the Texas Supreme Court. There was substantial evidence before the jury to raise the issue of the true ownership of the vehicle. This evidence was in addition to and independent of the administrative presumption of ownership which arose upon the proof of registration of the vehicle in the name of the named insured. The jury on disputed facts found that the named insured was the true

owner of the vehicle. The petitioner insured the named insured against the hazard of public liability in respect to the vehicle involved which was specifically listed in the policy and charged a full owner's premium for such insurance which would not have been chargeable for a vehicle registered in the name of the named insured and leased or hired from another. Under the Texas law the insurer by virtue of law intended to insure the named insured and any person driving an owned automobile with his permission. On the jury determination that the named insured was the owner of the vehicle, by operation of the Texas law the petitioner intended to insure the driver of the vehicle, who was driving with permission of the named insured, at the time of the accident. In short, petitioner was paid the full premium to provide the insurance coverage on which by the judgment below it has been called upon to respond. It is clear that the Court of Appeals has not decided an important state question in conflict with applicable state law. For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Irving L. Goldberg, do hereby certify that I served a copy of the foregoing Brief of Respondent in Opposition upon James A. Williams, Esquire, 916 Corrigan Tower, Dallas 1, Texas, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel of record at that post office address on November , 1961.

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IRVING L. GOLDBERG